INDEX

	PAGE
Statement of Case	1
Facts	2
Argument	3
I. The Petition for Certiorari Presents No Federal Question Because It Shows Clearly That the Questions Attempted to be Raised by the Petitioners Were Not Expressly or Necessarily Decided by the Supreme Court of North Carolina	3
II. The Granting of the Motion of the Attorney General to Dismiss the Attempted Appeals of the Petitioners as Premature presents No Federal Question	5
III. The Denial of the Petitions for Writs of Prohibition Presents No Federal Question	5
Conclusion	6

AUTHORITIES CITED

Barrington v. Missouri, 205 U. S. 483	6
Brooks v. Missouri, 124 U. S. 394	4
Carr v. Nichols, 157 U. S. 370	6
Ex Parte Mason, 105 U. S. 696	5
Funk v. State, 84 Tex. Cr. 402, 208 S. W. 509	5
Liberty Warehouse Co. v. Burley Tobacco Co-op. M. Association, 276 U. S. 71	5
Lynch v. New York, 293 U. S. 52	4
People v. Denman, 179 Cal. 497, 177 P. 461	5
Perry v. Shepherd, 78 N. C. 83	6
R. R. v. Newton, 133 N. C. 136, 45 S. E. 549	6
Smith v. Mississippi, 162 U. S. 592	6
Southwestern Bell Telephone Co. v. Oklahoma, 303 U. S. 206	4
State v. Cox, 215 N. C. 458, 2 S. E. (2d) 370	5

State v. Inman and Stark, 224 N. C. 531..... 1, 4, 5
State v. Rooks, 207 N. C. 275, 176 S. E. 752..... 5
State v. Whitaker, 114 N. C. 818, 19 S. E. 376..... 6
United Gas Public Service Co. v. Texas, 303 U. S. 123.. 5
Van Oster v. Kansas, 272 U. S. 465..... 5
Whitney v. California, 274 U. S. 357..... 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.

DEWEY F. INMAN and RUSSELL A. STARK,
Petitioners,

vs.

THE STATE OF NORTH CAROLINA,
Respondent.

BRIEF OF THE STATE OF NORTH CAROLINA, RESPONDENT, OPPOSING PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The petitioners, Dewey F. Inman and Russell A. Stark, seek by writ of *certiorari* to have the United States Supreme Court review the decision of the Supreme Court of North Carolina denying, in its original jurisdiction, the application of each of the petitioners for a writ of prohibition, and dismissing as premature their attempted appeals from the action of the trial court in overruling their objections to the jurisdiction of said court. The opinion of the Supreme Court of North Carolina was filed October 18, 1944, and is reported as *STATE v. DEWEY F. INMAN and RUSSELL A. STARK*, 224 N. C. 531

FACTS

The petitioners, Dewey F. Inman and Russell A. Stark, are, and were at all times hereinafter mentioned, enlisted men in the United States Army, serving in the 87th Infantry Division (R. 4, 5). Each of the petitioners was stationed at Camp Mackall, North Carolina (R. 4). While on leave in Lee County, North Carolina, the petitioners were arrested on warrants charging them with the capital offense of rape and with highway robbery. The warrants were returnable before the County Criminal Court of Lee County, North Carolina, sitting as a committing magistrate.

At the hearing in the County Criminal Court, Lieutenant Colonel George W. Weeks, Staff Judge Advocate, 87th Infantry Division, made demand upon the court for the surrender of the petitioners to the military authorities for trial by court-martial under the Articles of War (R. 26, 27). This demand was not allowed (R. 26). Thereupon, each of the petitioners filed a plea to the jurisdiction of the County Criminal Court. These pleas were denied (R. 26, 27).

At the July Term, 1944, of the Lee County Superior Court, true bills of indictment were returned against the petitioners charging each of them with the crimes of rape and robbery from the person (R. 2, 3, 4).

In the Superior Court of Lee County, before entering any plea and before the military authorities renewed their demand for the custody of the petitioners, the petitioners filed pleas to the jurisdiction of the Superior Court (R. 1, 8, 9, 10). This plea was denied (R. 9, 10).

Thereafter, before petitioners were called upon to plead, Lieutenant Colonel George W. Weeks, Staff Judge Advocate, 87th Infantry Division, filed a written demand for the surrender of the petitioners to military authorities (R. 4, 5). This demand was not allowed (R. 5, 6).

The petitioners then filed further pleas to the jurisdiction of the Superior Court (R. 11, 12). These pleas were denied (R. 13).

From the denial of the foregoing pleas, the petitioners attempted to appeal to the Supreme Court of North Carolina (R. 14). They also made application for writs of prohibition to prevent any further proceedings in the Superior Court of Lee County (R. 37).

The Attorney General of North Carolina filed a motion in the Supreme Court of North Carolina to dismiss the attempted appeals as premature and to deny the applications for writs of prohibition as there were other remedies available to the petitioners.

The Supreme Court of North Carolina dismissed the attempted appeals, and denied the applications for writs of prohibition.

ARGUMENT

This is a controversy between the petitioners as individuals and the State of North Carolina. Neither the United States Army nor any other department, institution or agency of the United States Government is or has been a party hereto except for the petitions filed by the United States Army in the trial courts. From the denial of their demands for the custody of the petitioners, the United States Army officials have not appealed and are not now seeking any review by this court.

I

THE PETITION FOR CERTIORARI PRESENTS NO FEDERAL QUESTION BECAUSE IT SHOWS CLEARLY THAT THE QUESTIONS ATTEMPTED TO BE RAISED BY THE PETITIONERS WERE NOT EXPRESSLY OR NECESSARILY DECIDED BY THE SUPREME COURT OF NORTH CAROLINA.

A

It appears from the opinion of Mr. Justice Seawell for the Supreme Court of North Carolina that only two questions were decided by that court. Those two questions were:

(1) Was the attempted appeal premature?
(2) Should the writs of prohibition be granted?

The question as to who had prior or paramount jurisdiction was not decided by the North Carolina Supreme Court. *STATE v. INMAN AND STARK*, 224 N. C. 531, 541. However, the petitioners still may have this question determined, if its determination should become necessary to protect their rights, by a timely appeal. *State v. Inman and Stark*, 224 N. C. 531, 542.

Since the highest court of the State did not expressly or necessarily decide any Federal question attempted to be presented by the petitioners, this court has no jurisdiction to review the decision of the North Carolina Supreme Court.

Brooks v. Missouri, 124 U. S. 394;
Whitney v. California, 274 U. S. 357;
Lynch v. New York, 293 U. S. 52;
Southwestern Bell Telephone Company v. Oklahoma, 303 U. S. 206.

In *Whitney v. California*, 274 U. S. 357, 360, it is said:

"It has long been settled that this court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a Federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court."

B

Even if it be conceded, for the sake of argument, that a Federal question would have been presented had the United States Army officials prosecuted an appeal to the Supreme Court of North Carolina, it does not follow that the appeals of these individual petitioners present such a question.

The choice of the tribunal by which he is to be tried has not been given to the offender.

See *Ex Parte Mason*, 105 U. S. 696, 699;
Cf. People v. Denman, 179 Cal. 497, 177 P. 461;
Cf. Funk v. State, 84 Tex. Cr. 402, 208 S. W. 509.

II

THE GRANTING OF THE MOTION OF THE ATTORNEY GENERAL TO DISMISS THE ATTEMPTED APPEALS OF THE PETITIONERS AS PREMATURE PRESENTS NO FEDERAL QUESTION.

In North Carolina the settled rule is that an appeal in a criminal case lies only from a final judgment.

State v. Cox, 215 N. C. 458, 2 S. E. (2d) 370;
State v. Rooks, 207 N. C. 275, 176 S. E. 752.

It appears that the attempted appeals in the instant case were dismissed because they were not appeals from final judgments.

State v. Inman and Stark, 224 N. C. 531, 541.

The appeals being disposed of in accordance with settled local procedure, no question is presented for decision by this court.

Van Oster v. Kansas, 272 U. S. 465;
Liberty Warehouse Co. v. Burley Tobacco Co-Op. M. Association, 276 U. S. 71;
United Gas Public Service Company v. Texas, 303 U. S. 123.

III

THE DENIAL OF THE PETITIONS FOR WRITS OF PROHIBITION PRESENTS NO FEDERAL QUESTION.

In declining to grant the writs of prohibition, the Supreme Court of North Carolina said (*State v. Inman and Stark*, 224 N. C. 531, 542):

> "While recognized in this jurisdiction, the writ of prohibition is considered discretionary and has been uniformly denied where there is other remedy. *Perry v. Shepherd*, 78 N. C., 83; *R. R. v. Newton*, 133 N. C., 136, 137, 45 S. E., 549; *S. v. Whitaker*, 114 N. C. 818, 19 S. E., 376. The defendants' apprehension that they may suffer penalties of a judgment rendered by a court without jurisdiction is not well founded, provided they should be under the necessity of presenting the question upon a timely appeal."

This being a matter within the discretion of the Supreme Court of North Carolina, this court has no jurisdiction to review its action.

Carr v. Nichols, 157 U. S. 370;
Smith v. Mississippi, 162 U. S. 592;
Barrington v. Missouri, 205 U. S. 483.

CONCLUSION

The questions set out in the petition are not federal questions, or, if they are, the questions are not substantial and are not of sufficient importance to warrant consideration by the United States Supreme Court. Therefore, the writ of *certiorari* should be denied.

Respectfully submitted,

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